Bending the Judge's Ear: *Ex Parte* Contacts in Quasi - Judicial Land Use Decisions

Abstract

Land use decisions by local government often affect property rights. Under certain conditions, the decision-making process is held to quasi-judicial standards. These standards include restricting communication between affected parties and the decision-makers to an official hearing. Not all affected parties, such as neighborhood residents, may know about these ex parte rules and might unintentionally violate them. This article explores ways to educate participants in the process to limit ex parte communication and ensure a fair process for all involved.

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Overview

In some land use decisions, local governing bodies are required to follow rules that protect an individual's constitutional rights to procedural due process. Among these rights is the right to an impartial decision-maker. *Ex parte* (private) contacts with that decision-maker are prohibited to ensure fairness. However, the rules that are imposed to create a level playing field between proponents and opponents sometimes work in reverse, making the process inherently *un*fair. This is especially true in cases where one side is represented by an attorney who follows the rules strictly, while the other side is either unaware of the rules or choses not to follow them. There are some ways to make this playing field fairer for all.

What are Quasi-Judicial Decisions?

North Carolina's cities and counties control the use of land in a variety of ways. Some of these land use decisions are made using procedures employed in our state's courtrooms in order to protect the constitutional rights of the parties involved. These decisions are described as being "quasi-judicial." *Humble Oil and Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974).

Quasi-judicial decision-making is required when a local governing body – such as the board of adjustment, planning board or city council – applies pre-existing laws or policies to a specific landowner or situation. *Lancaster v. Mecklenburg County*, 334 N.C. 496, 507, 434 S.E.2d 604 (1993). In these instances, the governing body must determine that certain facts exist, and then use some discretion in applying those facts to the pre-determined laws or policies. For example, when a

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board of adjustment considers whether to allow a variance from a property owner's setback requirements, it must find facts to establish that, among other things, public safety is secured. N.C. Gen. Stat. §§160A-388 and 153A-345. The securing of public safety is the pre-determined law, and the evidence before the board that substantiates the securing of public safety creates the facts.

The most common types of quasi-judicial land use decisions are conditional and special use permits, variances, and appeals of zoning officials' decisions. Conditional and special use permits are sometimes used as interchangeable terms. These terms describe decisions regarding uses that are allowed within certain zoning districts so long as the authorized body (e.g., board of adjustment, planning board or governing body) finds that certain conditions exist to show that the requested location is appropriate.

Because variances and appeals of administrative decisions tend not to incite large and active groups of opponents, *ex parte* contacts in these decisions are not typically a problem. It is usually with conditional and special use permits for potentially controversial uses (e.g. landfills, communication towers, airports, etc.) that such contacts become an issue.

3. Procedural Due Process and the Impartial Decision Maker

Quasi-judicial decision-making is employed to protect an individual's rights of procedural due process when a governing body turns its attention from the broader public policy arena and focuses on an individual situation. *Lancaster*; Id. An impartial decision maker is a critical component of this process. *Crump v. Board of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990). North Carolina courts also have held that due process in quasi-judicial decisions mandates "that all fair trial standards be observed when these decisions are made." This includes an evidentiary hearing with the right of the parties to offer evidence; cross-examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by competent, substantial and material evidence. *Devaney v. City of Burlington*, 143 N.C. App. 334, 545 S.E.2d 763 (2001), quoting *Lancaster v. Mecklenburg County*, 334 N.C. 496, 507-08, 434 S.E.2d 604, 612 (1993); *Humble Oil v. Board of Aldermen*, 284 N.C. 458, 470, 202 S.E.2d 129 (1974).

By way of contrast, land use decisions applicable to an entire jurisdiction are made through a governing body's *legislative* powers. When acting in a legislative manner, governing bodies may use extremely broad discretion, and public hearings are held merely for public input. The board, however, need not abide by public sentiment at all, and courts are reluctant to disturb or question a legislative decision. See, generally, David W. Owens, *Legislative Zoning Decisions: Legal Aspects*, pp. 10, 38-39 (2nd Ed. 1999). Both board members and citizens often have difficulty jumping from one type of decision-making process to the other. The casualty usually is the formality of the quasi-judicial process.

4. *Ex Parte* Contacts

An *ex parte* contact is nothing more than a private conversation with a decision-maker about a matter being adjudicated. Those adversely affected in the proceeding are not present to hear or refute the substance of any statement. *Black's Law Dictionary*, Seventh Edition (1999).

Ex parte contacts violate the principles of a fair trial in three basic ways. First, they are not made under oath. Second, by their nature, they are not subject to cross-examination.

The third and perhaps most important reason *ex parte* contacts are prohibited in quasi-judicial land use decisions is because they taint the decision-maker's opinion, encouraging him or her to view the ultimate decision solely through the lens of the speaker. Unlike public hearings where inaccurate or exaggerated statements can be rebutted and witnesses can be cross-

examined, *ex parte* contacts allow speakers to sway the decision-maker in an uncontrolled forum and to color his or her opinion regardless of the true facts that may exist.

Preliminary opinions often tend to become stronger, not weaker, as more evidence is presented. Psychologists and communication experts who study advocacy in jury trials sometimes refer to the "rule of primacy" to describe the human tendency to continue to believe what one first believes, and to perceive subsequently acquired evidence in a manner that corroborates that initial opinion. Numerous studies show that most jurors form an opinion of a case early in the proceeding and pay closer attention to the evidence that supports their view. James E. McElhaney, *Taking Sides: What Happens in the Opening Statement*, 78 A.B.A.J. 80 (May 1992). Subsequent evidence is sought which reinforces initial conclusions. Donald E. Vinson, *How to Persuade Jurors*, 71 A.B.A.J. 72 (Oct.1985).

To the extent that *ex parte* contacts with decision makers tend to pollute both the ultimate decision and the quasi-judicial process itself, *ex parte* communications are a problem to be taken seriously.

5. Generally, Attorneys Are Not the Problem

In judicial proceedings, *ex parte* communications are extremely rare. Both judges and lawyers act as their own checks and balances, and such contacts are clearly prohibited and widely known and understood. An erosion in the rule for some would be an erosion for all.

In all fairness, some attorneys who practice only occasionally in the land use arena confuse quasi-judicial hearings with legislative hearings. And in some instances, the "common law" of the local jurisdiction treats all land use decisions as if they were legislative. In those cases, attorneys do engage in *ex parte* communications although technically they are prohibited. In yet other circumstances where the process is less protected and citizens are communicating freely with board members, some attorneys will communicate with them *ex parte* as well if only to be able to protect their client by participating in the process when the real decision might actually be made.

Rule 3.5(a)(3) of the Rules of Professional Conduct of the N.C. State Bar states that a lawyer shall not "communicate *ex parte* with a judge or other official except in the course of official proceedings; in writing, if a copy of the writing is furnished simultaneously to the opposing party; orally, upon adequate notice to opposing party; or as otherwise permitted by law." Comment [8] to RPC Rule 3.5 explains that the purpose for curtailing *ex parte* contacts is to protect the appearance of impartiality as well as impartiality itself: "All litigants and lawyers should have access to tribunals on an equal basis. Generally . . . a lawyer should not communicate with a judge . . . in circumstances which might have the effect or give the appearance of granting undue advantage to one party."

Under Rule 0.3(l) of the Revised Rules of Professional Conduct of the North Carolina State Bar, "'tribunal' denotes a court or a government body exercising adjudicative or quasi-adjudicative authority." In other words, an attorney's ethical code of conduct (which forbids *ex parte* contacts with a tribunal) requires that he or she abide by the same rules when representing clients in land use quasi-judicial proceedings.

Canon 3 A(4) of the Code of Judicial Conduct states that a judge "should accord every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending procedure."

Further, N.C. Gen. Stat. §150B-40(d) states that in a hearing governed by the Administrative

Procedures Act (APA) "a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case . . .shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or his representative, except on notice and opportunity for all parties to participate." While the APA does not govern quasi-judicial proceedings in the land use context, it has been held to be "highly pertinent." *Coastal Ready-Mix Concrete v. Board of Commissioners of the Town of Nags Head*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980).

6. The Political Realities of Land Use Decision-Making

The reality of hotly debated rezonings and special use permit applications is that what can seem like casts of thousands get involved. Inaccurate information and deliberate distortions of facts swirl through a community. Information – true or not – flows fast and freely. Board members immediately begin to hear claims of "fact" that have no basis in the underlying petition or that are unsupported by objective studies. For example, few jurisdictions in this state have not heard the rumor that one residential subdivision or another was secretly planned as a subsidized public housing project. If unchallenged, false claims become an insidious form of "truth" that lurks in the hearing room or, worse, in board members' heads.

When a landfill or shopping center or new airport hub is proposed, board members' phones start ringing, their fax machines hum, emails pop up, mailboxes fill, and their arms (and ears) are grabbed at church, the grocery store aisles, civic club meetings – anywhere people can catch them. In more cases than not, the board member has never heard about the prohibition against *ex parte* communications, or he or she knows about it but forgets in the moment or just dismisses what has been learned. This is especially problematic when the matter is before an elected board whose members more commonly make legislative decisions and who feel obligated to listen to constituents. It is already difficult enough to maintain a façade of impartiality when board members and the many party advocates and opponents are kin folks, neighbors, customers or clients, childhood chums, business associates, bowling league teammates, Sunday School classmates, or have any of the other ties that bind communities together. *Ex parte* contacts, in this context, are particularly effective in bending a board member's vision to see a petition through one particular lens.

Not only do lay board members generally fail to raise objections to these communications, but the citizen advocates, as a rule, have never heard the term "quasi-judicial" or have any idea what it entails or means. They have not studied the structures of adversary proceedings as attorneys have nor do the Rules of Professional Conduct that apply to attorneys in these proceedings apply to lay advocates. Consequently, while the side represented by an attorney who "knows better" sits idly by waiting for the hearing, the other side (typically zoning opponents) have camped out in board members' yards, making claims and reaching conclusions that have not yet been heard by the other side.

When one side follows the rules while the other side engages aggressively in *ex parte* contacts, the result is a corruption of due process. In some situations, it is minor. In other situations it is quite serious, and the intended result – a biased decision-maker committed to one position – is successful. Consequently, rules intended to create a level playing field by banning out-of-hearing communications in fact create unlevel playing fields where one side is trained to follow the rules and is further bound to follow them through rules of professional conduct that do not apply to their opponents, while opponents are unaware of the basic rules themselves, do not operate under ethical guidelines that serve as a rule overlay, and the rules are seldom explained or enforced.

It is perhaps worth some damage control that board members are required to disclose at

the hearing any *ex parte* contacts they have had with parties and the information received. But this very seldom happens. The disparity between communications received versus those that are disclosed should be evident to anyone with experience in these hearings. In fact, in most jurisdictions disclosure *never* occurs after *ex parte* meetings and communications with parties to a proceeding. Either board members do not know of this requirement, or they know about it but choose to ignore it. After all, disclosure in itself is an admission that the board member was engaging in prohibited conduct.

7. Is There a Band-Aid or Fix?

A. *The Possibilities*

There are four ways, conceptually, to address the problem of inappropriate *ex parte* communications: 1) focus on the participating advocates and their behavior; 2) focus on the board members and their ethical duty to close the door to these communications; 3) change the entire model; or 4) some combination of the above.

B. *The Advocates*

Very few public decisions elicit intense citizen comment or sentiment but the notification of a potential land use change is clearly on that short list of hot buttons. Strong public reaction often stems from general fears of change coupled with the human tendency to protect one's territory from invasion and potential control by outsiders. In the absence of little more than the notification itself, the worst scenario is assumed. It is not an overstatement to say that some land use changes create mild hysteria. Once notified of the proposed change, the understandable first response is often to contact those who will hear and decide the issue.

With respect to non-attorney advocates, the key questions are whether they can be educated in any meaningful way about the rule against *ex parte* contacts and, if educated, whether they will be willing to sit on their hands until the hearing. Given the often conflagratory nature of land change opposition, the best way to begin an education process is with the required notification to adjacent property owners. Except for the added expense of printing an extra page per mailing, there are no compelling reasons why the basic rules and elements of a quasi-judicial proceeding cannot be spelled out in a simple and straightforward manner at this stage. The next line of defense is for staff who answer citizens' inquiries to explain the rule at that time, as well as to explain the ways in which evidence and proof are handled at the hearing.

Attorneys and other professionals who represent applicants will be much more likely to wait and speak at the hearing if they know that board members will not be pressured prior to that time by citizen opponents. To make sure that attorneys and others representing applicants appreciate that they are not advocating within the open political process of a legislative decision, the same type of notification sent to adjacent owners also could be made part of the application itself, requiring the applicant and the applicant's representative to sign a page that articulates the basic rules.

C. *Board Members*

It is logically easier to educate board members about the rules of *ex parte* contacts than it is to educate the neighbors or citizen advocates. Board members go through several such hearings during their term while the typical neighborhood opponent rarely has more than one every few years, they have the ready advice of counsel regarding procedures, they can and often do attend seminars sponsored by the Institute of Government, and they usually do not have a vested interest in the outcome of any of the land use change applications. Further, it is easy to repeat the rules at the beginning of quasi-judicial hearings and to reprint the rules in the packet of materials they receive before each meeting.

Arguably, there is no good excuse for board members not being educated as to the basic rules of the quasi-judicial process. The better question is whether board members can be educated sufficiently that it is redundant or unnecessary to educate members of the public.

D. *The Model – Could it be Changed Altogether?*

Yet another approach to protecting due process is to allow information to come in from all sides prior to the hearing but with a formal emphasis on 1) document and information disclosures and 2) reminders to board members of their duties to keep open minds. Such an open channel process is arguably a more honest means of adapting to contacts that will occur anyway, even with the best checks and balances in place.

If such a system were adopted, board members should receive at least a synopsis of the application at the time of its submittal so that it could not be mischaracterized by opponents. Board members should be prohibited from giving strategic advice to either side and continually cautioned against promising anything more than that they will keep an open mind until all evidence is presented at the hearing. Letters, faxes, emails and other documents could be characterized as public documents available for scrutiny by any interested party upon request. The formal mechanism for disclosures would have to be worked out so that board members were not be subjected to copy costs and so that their time is not abused. If inaccurate or biased information is gleaned from opponents' statements or literature, quick responses and corrections could follow.

Board members probably should be reminded in each hearing cycle what their duties are and how evidence is to be received and perceived. For example, it would help to educate Board members regarding reliability of types of evidence and how to distinguish between opinion testimony and facts.

E. *A Hybrid Solution*

Changing the entire model would be the steepest of the mountains to climb, and if a county or municipality were to adopt such an open system it would likely lead eventually to litigation to determine whether parties' due process rights are sufficiently protected. The answer to that question would lie in the manner of its structure and execution, but a quasi-judicial process where communication is allowed with decision makers throughout period leading up to the hearing could be devised.

The easier solution – and probably the most effective – would be to keep the system we have where contacts are prohibited prior to the hearing, but focus energies on educating *both* board members and advocates as described in the sections above. *Ex parte* contacts are still going to occur, but the egregiousness of violations should dissipate.